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Rights of the conceived child Derechos del concebido

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ABSTRACT

Fertilization consists of the fusion of the male and female gametes in the outer third of the uterine tube to form the zygote, which begins its cell division, travels to the uterus, implants as a blastocyst in the endometrium after seven days and begins the processes of embryogenesis and morphogenesis. Conception is the action or effect of a woman becoming pregnant. About the rights established for the conceived, the beginning of human life raises a wide discussion between the definitions proposed by science and those of civil society groups. Not being the zygote a human person, according to the Inter-American Court of Human Rights (IACHR) and others, it would not be subject to the rights established for the person, which would be closely related to the rights of the pregnant woman. Conception would occur when the embryo implants in the uterus and Article 4 of the IACHR would not apply. Peruvian doctrine, legislation and jurisprudence establish broad legal protection in favor of the conceived and indicate the beginning of life from the moment of fertilization. The Judgment of the IACHR in the case of *Artavia Murillo v. Costa Rica* introduces the Spanish figure of the pre-embryo, which is not granted legal protection until 14 days, when medical science establishes the implantation of the embryo in the maternal endometrium. For current ethical considerations, human pregnancy begins with the implantation of the blastocyst in the endometrium and there is no basis for accepting the right of the conceived from the moment of fertilization as if it were a person. However, it is pointed out that human life has an uninterrupted continuity from conception to its natural end, death. The zygote is life that begins with its own genetic endowment different from that of its progenitors. The preimplantation embryo can only give rise to a human being that is gestated and develops within the body of another person, with its own vital dynamics.

Key words: Fertilization, Blastocyst, Embryonic development, Beginning of human life, Human rights, Reproductive rights, Child advocacy, Women's rights, Civil rights, Legal rights, Jurisprudence, National Legal System, Inter-American Court of Human Rights.

RESUMEN

La fecundación consiste en la fusión de los gametos masculino y femenino en el tercio externo de la trompa uterina para constituir el cigoto, que inicia su división celular, viaja al útero, se implanta como blastocito en el endometrio a los siete días y comienzan los procesos de embriogénesis y morfogénesis. Concepción es la acción o efecto de quedar embarazada una mujer. En el tema de los derechos establecidos al concebido, el inicio de la vida humana plantea amplia discusión entre las definiciones que plantea la ciencia frente a las de grupos de la sociedad civil. No siendo el cigoto una persona humana, de acuerdo con la Corte Interamericana de Derechos Humanos (CIDH) y otros no sería sujeto de los derechos establecidos para la persona, los cuales estarían íntimamente relacionados a los derechos de la mujer embarazada. La concepción ocurriría cuando el embrión se implanta en el útero y no aplicaría el artículo 4 de la CIDH. La doctrina, la legislación y la jurisprudencia peruana establecen amplia tutela jurídica a favor del concebido e instauran el inicio de la vida a partir de la fecundación. La Sentencia de la CIDH para el caso *Artavia Murillo contra Costa Rica* introduce la figura española del preembrión, al cual no se le otorga tutela jurídica hasta los 14 días, momento en que la ciencia médica establece la implantación del embrión en el endometrio materno. Para consideraciones éticas actuales, el embarazo humano empieza con la implantación del blastocisto en el endometrio y no existe sustento para aceptar el derecho del concebido desde el momento de la fecundación como si fuera una persona. Empero se señala que la vida humana posee una continuidad ininterrumpida desde su concepción hasta su fin natural, la muerte. El cigoto es vida que se inicia con dotación genética propia diferente a la de sus progenitores. El embrión preimplantatorio solo podrá originar un ser humano que se gesta y desarrolla dentro del cuerpo de otra persona, con propia dinámica vital.

Palabras clave: Fecundación, Blastocisto, Desarrollo embrionario, Inicio de la vida humana, Derechos humanos, Derechos sexuales y reproductivos, Derechos del niño, Derechos de la mujer, Derechos civiles, Derechos legales, Jurisprudencia, Corte Interamericana de Derechos Humanos.



FERTILIZATION AND CONCEPTION

José Pacheco Romero

REPRODUCTIVE CELLS

The egg and the sperm are specialized reproductive cells resulting from a process called meiosis; each one contains 23 chromosomes that, when fused, cause genetic recombination with 23 pairs of chromosomes.

At the moment of coitus, the spermatozoa are deposited in the vagina, where, to avoid vaginal acid and immune responses, they quickly meet the cervical mucus that filters the spermatozoa of low morphology and mobility, and only a minority continue their ascent with rapid flagellar movements, favored by contractions of the myometrium. A few thousand sperm reach the fallopian tubes in 10 to 15 minutes. The tubes have secretory activity, ciliogenesis and rhythmic beating ciliary motility according to the day of the sexual cycle. The cyclic contractile activity of the tubal musculature and the ciliary mobility that varies from day to day according to the hormonal variations of the sexual cycle allow ovular and sperm transport by means of liquid currents⁽¹⁾. At the ampullary-isthmic junction of the tube, the sperm remain fertile for 2 to 2 ½ days, become capacitated and hyperactivated⁽²⁾.

Similarly, the tube is the essential link between the ovary and the uterus in the female, whose transport mechanisms include the orderly transfer of the egg from the ovary to the tubal fimbria in about 30 hours and ampullary retention of the egg another 30 hours for fertilization⁽³⁾.

FERTILIZATION

Fertilization is defined as the fusion of the male and female gametes to form a single cell called a zygote, which develops into a new individual⁽⁴⁾. In humans, fusion takes place in the outer third of the uterine tube, lasts several hours and consists of 3 phases: penetration of the sperm, activation of the oocyte and amphimixia or copulation of the pronuclei. The sperm are guided towards the oocyte by rheotaxis, chemotaxis and thigmotaxis, penetrate the tubal mucus and the oo-

porous cumulus, corona radiata, zona pellucida and vitellus of the oocyte, where the sperm head increases in size to form the male pronucleus⁽¹⁻³⁾. The chromatin of the oocyte condenses within the female pronucleus and both pronuclei initiate their development. Within 24 hours of fertilization, the egg nucleus has completed meiosis and the egg and sperm nuclei fuse. The metaphase of the first mitosis of the egg marks the end of the fertilization process; this process lasts approximately 36 hours in humans⁽³⁾.

ZYGOTE, BLASTOCYST, EMBRYO, FETUS

With fusion, the cell is known as a zygote. The zygote becomes active, initiates cell division and the developing embryo travels through the oviduct to the uterus on the third postovulatory day⁽⁵⁾ and must implant as a blastocyst in the endometrium within seven days, or it will deteriorate and die. Upon implantation, the processes of embryogenesis and morphogenesis begin.

The outer layers of the blastocyst grow into the endometrium by digestion of endometrial cells. The blastocyst chorion releases β -hCG that keeps the corpus luteum active with adequate levels of progesterone to form the placenta and sustain the developing embryo. Trophoblast cells protect the embryo itself and certain components of the extraembryonic membranes from the maternal immune system dedicated to destroying foreign tissues⁽⁶⁾. Once the placenta is formed, it takes care of the nutrient and waste needs of the embryo and fetus. At five weeks, the limb buds, eyes, heart, and liver have basically formed. Transvaginal ultrasound allows visualization of a gestational sac (without a fetal pole) between 4.5 and 5.0 weeks of gestation, and the heartbeat is visible at the beginning of week 6 transvaginally and one week later, abdominally. At eight weeks, the term fetus applies, and the body is basically formed.

THE CONCEIVED

In another other of ideas, conception is the action or effect of conceiving or being conceived. To conceive is: Becoming pregnant a woman or pregnant a female with one or more viable embryos after fertilization⁽⁴⁾.



RIGHTS ESTABLISHED FOR THE CONCEIVED CHILD

Miguel Gutiérrez Ramos

Throughout the centuries, there are two subjects that, from an ethical or moral point of view, have concerned human beings: the beginning and the end of life. At present, at least one of them has reached a consensus, and that is death; and fortunately, because otherwise, for example, there would be no cadaveric organ transplants. When a person is brain dead, there is still human life, which makes it possible to donate vital organs.

Unfortunately, for the beginning of human life, relative to everyone, there is still no consensus. In addition, defining the conceived as a synonym of person by some non-scientific groups, has caused some countries to consider it as such in their normative documents.

UNIVERSAL DECLARATION OF HUMAN RIGHTS - 1948

In this main document there is no specific mention of the unborn child as such; moreover, already from the first article it mentions: 'human beings are born', 'every person'; that is, it marks the relevance of being born to refer to a person^(7,8).

AMERICAN CONVENTION ON HUMAN RIGHTS - 1969

The American Convention on the Guarantee of Human Rights, in Article 4. Right to Life, states that, 1. This right shall be protected by law and, in general, from the moment of conception⁽⁹⁾.

POLITICAL CONSTITUTION OF PERU - 1993

Although Article 2 of the 1993 Political Constitution of Peru recognizes the right of the unborn child in 'everything that favors him/her', it is considered within the premise of 'Every person', so by indicating 'unborn child', it would be considered 'a person'⁽¹⁰⁾.

UNIVERSAL DECLARATION ON BIOETHICS AND HUMAN RIGHTS OF THE UNESCO-2005⁽¹¹⁾

Declaration approved by 190 countries at the 33rd Session of the General Conference of UNE-

SCO, has as its antecedent aspects related to the genome and human genetic data; despite this, the reference to rights is made in terms of 'the person', there is no reference to the 'conceived' in any of its principles or articles.

INTERPRETATION OF ARTICLE 4.1 OF THE RIGHT TO LIFE OF THE AMERICAN CONVENTION ON HUMAN RIGHTS, PACT OF SAN JOSÉ. 2012

For a lawsuit filed in 2001 regarding the right to in vitro fertilization (IVF), suspended because it violated the right to life and dignity of the human being, the Inter-American Court made an exhaustive analysis from the legal and scientific point of view, giving a systemic and historical interpretation, where it analyzed the American Human Rights System, the Universal Human Rights System, the European Human Rights System, and an evolutionary interpretation in November 2012 and concluded that⁽¹²⁾: The embryo cannot be understood as a person for the purposes of Article 4.1 of the American Convention.

Likewise, with available scientific grounds, the Court concluded that 'conception', in the sense of Article 4.1, takes place from the moment the embryo implants in the uterus, reason for which before this event there would be no place for the application of Article 4 of the Convention⁽¹³⁾.

OTHER NOTES FROM SCIENCE

The 'zygote', which is formed by the union of the spermatozoon and the ovum, has its own genetic code; that is, an informative code that needs to be implanted in the uterus to be activated, and through uterine mediators allow the blastocyst to be activated and differentiate into cyto- and syncytiotrophoblast⁽¹⁴⁾. If the embryo does not implant in the woman's body, its chances of development are nil. If an embryo never managed to implant in the uterus, it would not be able to develop, since it would not receive the necessary nutrients, nor would it be in an adequate environment for its development (...)⁽¹³⁾.

Moreover, as Marcó Bach points out, the new genome that is formed during the fertilization process is a necessary but not sufficient condition, since the factors of the internal and external environment modify the expression of genetic information⁽¹⁵⁾.



It can be stated with certainty that the hypothesis that the development of the zygote is a continuous and uninterrupted process is not true; that is, that the fertilized ovum with its 2 pronuclei is already a 'little person' and only its cells multiply continuously, with continuous and quantitative growth. In biology, what occurs first is a qualitative change, expressed by cell differentiation up to 8 weeks. The first differentiation occurs in the uterus, with implantation⁽¹⁶⁾. The differentiation of the nervous system (neuro cerebral) is the last, between 42 and 56 days⁽¹⁷⁾. At 8 weeks the qualitative changes cease, they are already organized, and the quantitative changes occur, i.e., continuity.

HOW DO WE DEFINE A PERSON?

The conclusion reached when we refer to a person is that no individual could act as such if he/she did not have a biological substrate, and by his/her relationship with reason, with intellectual or mental capacity. This substrate must be found in the central nervous system, which begins to form from the second or third week of embryonic development when the neural plate appears⁽¹⁷⁾. The number of efficient neuronal synapses is reached around 4 months in the visual cortex⁽¹⁸⁾, when the fetus begins to be viable. This substrate is not present in the egg or zygote, nor in the misnamed 'conceived'.

CONCLUSIONS

Not being the zygote, wrongly called conceived, a human person, not only according to the Inter-American Court of Human Rights but also by the arguments presented, would not be subject to the rights established for the person.

The zygote has rights, but these are intimately related to the rights of the woman who has the pregnancy.

The 'conception' takes place from the moment the embryo is implanted in the uterus, which is why before that time there would be no place for the application of Article 4 of the Inter-American Convention on Human Rights⁽¹³⁾.

LEGAL PROTECTION AND THREATS TO ITS EFFECTIVE CONSTITUTIONAL PROTECTION IN PERU

Alberto González Cáceres

INTRODUCTION

In our country there is full and ample legal protection in favor of the conceived child. It is not only the doctrine and the national Jurisprudence that have established the beginning of life from the fertilization of the ovum by the spermatozoid, but also our national legislation. In accordance with the above and in consideration of the consequence between the mandate of the Law and the obligation that all citizens must comply with its mandates, it is not possible to perform any activity on the conceived child in such a way that it causes any kind of harm, as is the case of ovidonation, cryopreservation, reduction (elimination), preventing its implantation in the maternal endometrium.

Within the framework of our normative hierarchy there are the following norms of major relevance:

SUPRANATIONAL LEGISLATION

1. Convention on the Rights of the Child (November 20, 1989)⁽¹⁹⁾

Approved by Legislative Resolution N° 25278 of August 3, 1990.

Article 1.- For the purposes of the present Convention, a child means every human being under eighteen years of age, unless, by virtue of the law applicable to him/her, he/she has reached the age of majority before.

Article 8.-

1. The States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name, and family relations in accordance with the law without unlawful interference.



2. Where a child is illegally deprived of some or all the elements of his or her identity, States Parties shall provide appropriate assistance and protection with a view to speedily re-establishing his or her identity.

CONSTITUTIONAL NORMS

Political Constitution of Peru in force as of January 01, 1994⁽²⁰⁾

Article 1. of the Constitution. - Defense of the human person

The defense of the human person and respect for his dignity are the supreme aim of society and the State.

Article 2. of the Constitution. - Fundamental rights of the person

Every person has the right: To life, to his identity, to his moral, psychological and physical integrity and to his free development and well-being. The conceived person is a subject of law in everything that favors him/her.

LEGAL NORMS

Civil Code⁽²¹⁾

Article 1. of the Civil Code. - Subject of Law

The human person is a subject of law from birth. Human life begins at conception. The conceived person is a subject of law for all that favors him/her. The attribution of patrimonial rights is conditioned to be born alive.

Article 2. Recognition of pregnancy or childbirth

The woman may request judicial recognition of her pregnancy or childbirth, with the summons of the persons who have an interest in the birth.

Penal Code⁽²¹⁾

Article 124. A.- Damage to the conceived child

Whoever causes harm to the body or health of the unborn child shall be punished with imprisonment of not less than one year nor more than three years.

Law 26842, General Law of Health promulgated on July 15, 1997⁽²²⁾

Article III) of the Preliminary Title:

Every person has the right to the protection of his health under the terms and conditions established by law. The right to health protection is inalienable. The conceived person is a subject of rights in the field of health.

Code of Children and Adolescents. Law 27337 promulgated on July 21, 2000⁽²³⁾

Article I of the Preliminary Title:

Every human being is considered a child from conception to twelve years of age and an adolescent from twelve to eighteen years of age.

The State protects the conceived for everything that favors him/her. If there is any doubt as to the age of a person, he shall be considered a child or adolescent until proven otherwise.

Article II of the Preliminary Title. - Subject of rights

Children and adolescents are subjects of rights, freedoms and specific protection. They must comply with the obligations enshrined in this regulation.

Article 1.- To life and integrity. -

Children and adolescents have the right to life from the moment of conception. The present Code guarantees the life of the conceived child, protecting him/her from genetic experiments or manipulations contrary to his/her integrity and physical or mental development.

Article 2.- To be cared for by the State from conception. -

It is the responsibility of the State to promote the establishment of adequate conditions for the care of the mother during the stages of pregnancy, childbirth and the postnatal phase. The State shall provide specialized care for adolescent mothers and shall promote breastfeeding and the establishment of day care centers. Society will help to make these guarantees effective.



NATIONAL JURISPRUDENCE

Decision of the Constitutional Court. EXP. 02005-2009-PA/TC LIMA⁽²⁴⁾

38. Taking into account all that has been expressed up to this point, and having the dilemma of having to opt for one of the principles of constitutional interpretation developed above with respect to the constitution of the conceived being, this Court decides to consider that the conception of a new human being occurs with the fusion of the maternal and paternal cells, which gives rise to a new cell that, according to the current state of science, constitutes the beginning of the life of a new being.

A unique and unrepeatable being, with its complete genetic configuration and individuality, which will be able, if its vital process is not interrupted, to continue its course towards its independent life. Nesting or implantation, therefore, is part of the development of the vital process, but does not constitute its beginning. Moreover, although there is an inseparable link between the conceived-mother and conception-pregnancy, they are different individuals and situations, respectively; since it is the conception that conditions the pregnancy and not the pregnancy to the conception, and it is the conceived that originates the condition of pregnant woman, and not the pregnant woman that originates the condition of conceived.

Administrative Jurisprudence

INDECOPI. Consumer Protection Commission. Final Resolution No. 2543 -2010/CPC⁽²⁵⁾

On January 7, 2010, Mr. Monteza filed a complaint against Rimac for allegedly violating the Texto Único Ordenado de la Ley del Sistema de Protección al Consumidor, for not having complied with the payment of the indemnity coverage for the death of his unborn child (hereinafter, the conceived child) who died in the womb of Mrs. Kritstel Evelyn Bravo Pretel (hereinafter, Mrs. Bravo) in the accident that occurred on October 12, 2009.

RIMAC denies the insurance payment because the termination of pregnancy does not presuppose an event of death.

The concept 'Subject of Law' is defined as an entity to which rights and duties are attributed. Likewise, 'Subject of Law' refers to the human being in four ways, being these:

- Conceived: unborn human being,
- Natural person: born human being,
- Organization of persons without being registered or recognized by the State, and,
- Legal person: organization of persons that by the formal fact of its registration becomes what is designated as a 'legal person'.

The conceived person is an unborn person; therefore, an embryo is a human being. However, it lacks the quality of a person, since it is only with birth that such quality is acquired.

For death to occur, the person must first be born. This does not occur in the case of interruption of pregnancy; therefore, no regulation provides for the issuance of a Death Certificate. Likewise, the Penal Code distinguishes between the crimes of Homicide and Abortion.

In accordance with the provisions of the aforementioned Code (children and adolescents), it follows that the conceived child is considered a human being and a child; and, consequently, a person, and therefore must be considered a subject of law in its entirety.

In this regard, the principle of specialty of norms must be considered, by which a special provision takes precedence over a general one. This means that if two rules with the rank of law establish contradictory or alternative provisions, but one is applicable to a more general spectrum of situations and the other to a more restricted spectrum, the latter will prevail over the former in its specific field.

In this regard, this Court considers that, insofar as life begins at conception, there is the possibility that it may cease during the period of pregnancy and the fetus may die in the mother's womb, in which case it is not necessary for the fetus to have been born for death to occur, since the fetus is a human being who enjoys life. In this sense, the allegation made by Rimac to exempt itself from the payment of the indemnity coverage is not reasonable.



THREATS TO THE RIGHTS OF THE CONCEIVED

Legal Threats

There is no doubt that the main threat to the legal protection of the unborn child, as well as to any fundamental right of the person, morals, Institutions, principles and values of Judeo-Christian origin come from foreign ideological environments and from their national promoters who, for financial gain, have been dismantling since the second half of the last century two thousand years of Christian-Aristotelian juridical wisdom to replace it systematically and consistently with new 'principles and values' that lead to the loss of the use of reason and consequently to the self-destruction of society and of man himself.

Having said the above, we can concretely affirm that the main threat to the legal order comes from the Inter-American System of Human Rights, for, having lost their noble origin of protection and legal protection of the human person, they have been taken by an ideological environment of deep content and relativist roots, which under the legal theoretical framework of the so-called neoconstitutionalism and its applied theory known as conventionality control, is imposed in almost all America, redefining totalitarianly the bases, foundations and constitutional texts, thus reborn a new colonialism, but this time of ideological character.

This can be understood and materialized precisely in the redefinition made by the Inter-American Court of Human Rights (IACHR Court) on the legal protection of the Conceived, which can only be protected, according to them, from the moment of nesting.

We will now see how the IACHR Court resolved the petition to authorize all types of assisted reproduction techniques in Costa Rica at the cost of the elimination of human lives in their first twelve days of life:

Artavia Murillo Judgment⁽²⁶⁾ - Diego García Sayán, President

187. In this sense, the Court understands that the term 'conception' cannot be understood as a moment or process excluding the woman's body, given that an embryo has no possibility of survival if implantation does not occur. Proof

of the above is that it is only possible to establish whether or not a pregnancy has occurred once the fertilized ovum has been implanted in the uterus, when the hormone called 'chorionic gonadotropin' is produced, which is only detectable in the woman who has an embryo attached to her. Before this, it is impossible to determine whether the union between the ovum and a spermatozoon occurred inside the body and whether this union was lost before implantation. (...)

189. Considering the foregoing, the Court understands the term 'conception' from the moment in which implantation occurs, which is why it considers that before this event, Article 4 of the American Convention does not apply. Likewise, the expression 'in general' allows inferring exceptions to a rule, but the interpretation according to the ordinary meaning does not allow specifying the scope of such exceptions.

To support our criticism of the IACHR Court's decision, we are reluctant to accept the legality of the San José Judiciary's decision, for which we share the position of the renowned Chilean professor Max Silva Abbott, who questions the legitimacy of the court for the following considerations⁽²⁷⁾:

1. The Control of Conventionality (CCV) is not contemplated in the American Convention on Human Rights (ACHR) and is a praetorian creation, emanating from the jurisprudence of the Court. It is a self-attribution that violates the principle of legality, which should govern any power, whether national or international.
2. Through the Control of Conventionality, the Inter-American Court (IACHR) is trying to give new powers to national judges, which violates the principle of legality.
3. The IACHR intends that not only judges should apply their interpretations of the ACHR (some of them very debatable, since they extract 'implicit' rights from it or have even ruled against its express text), but it also wants the normative production of the Executive and Legislative powers to adapt to its wishes; and even that democratic decisions also do so, since it considers that there are decisions that not even the people can adopt, if they violate what it considers to be human rights.



4. The Inter-American Court considers itself the monopoly interpreter of the ACHR. That is why it pretends that any interpretation it makes of it, in any sentence or in an advisory opinion, is 'added' to the pact, changing it in the end.
5. The Judges consider that international human rights treaties are 'living instruments', which must be adapted to the new times through their interpretation, which has ended up completely distancing them from their genuine meaning (and which was the one understood by the States at the time of signing them).
6. They have an 'autonomous meaning', that is, their meaning and scope depend not on what the states understood at the time of signing them, but on what the international bodies responsible for protecting them (international tribunals and human rights commissions or committees created by these same treaties) determine. Therefore, it is as if the treaties acquired a life of their own once they were created, and their evolution was completely beyond the control of the States, which would have granted a kind of 'blank check' to these bodies, submitting to their wishes. This would even affect the reservations made by the States. But it seems unlikely that this is what the states really wanted when they signed these treaties.
7. There are lax rules of interpretation (it is evolutionary, dynamic, finalistic, holistic, progressive, systematic, etc.), all of which gives total freedom to the interpreter to do what he/she wants.
8. The 'principle of progressivity or non-retrogression' is established: interpretation must go further and further in the protection of human rights and cannot devolve to interpretations that are less protective of them, which is linked, among other things, to the 'autonomous sense' and the quality of 'living instruments' of human rights treaties.

Material threats

There is no doubt that the Artavia Murillo ruling opens the way to a new legal qualification in Latin America regarding the conceived and, consequently, the appearance of two kinds of human life: the first of which is that which, assimilating it

to the Spanish regulations on assisted reproduction techniques, establishes a stage of human life not protected or not legally protected, called the pre-embryo⁽²⁸⁾ and a second stage or second kind of human life called embryonic life, which is protected from day 14, and which appears from the moment of nesting in the maternal endometrium.

Having mentioned the above, and as long as the Pact of San José is not denounced on the grounds indicated by Silva Abbott, the door is open or, concretely, the following would be legalized:

- Preimplantation diagnosis or genetic counseling, which allows the abortion of any embryo diagnosed with different or special abilities (e.g., Down syndrome).
- Ovodonation, which allows the fertilization of eggs other than those of the biological or gestational mother.
- Multifecundation.
- Cryopreservation of pre-embryos (cryopreservation) indeterminate in time.
- Pre-embryo reduction (euphemism for the elimination or disappearance of embryos).
- Pre-embryo transfer.
- Surrogate wombs.
- Post-fertilization intrauterine device (IUD) use.
- The use of the morning after pill (high doses of levonorgestrel).
- Other analogous or similar.

RIGHTS OF THE CONCEIVED: COMMENTARY I

Luis Távara Orozco

INTRODUCTION

This article is motivated by the so-called 'Rights of the Conceived', a term coined by non-medical professionals that causes confusion, because from the scientific-medical point of view and especially from the point of view of obstetricians



and gynecologists, when we refer to the product of conception we do so in terms of embryo or fetus, and many professionals of human reproduction add the term pre-embryo, depending on the stage we are talking about.

It is mentioned that 'a human life begins in the conceived person and is a person', a great confusion that has not been resolved over time. Life is a continuum that, to be such, requires another life that originates it, and so on⁽²⁹⁾.

Until a few years ago it was believed that coitus, ovulation, fertilization, and implantation were phenomena that all occurred simultaneously, and some people still believe so. However, for implantation to occur and, therefore, the onset of pregnancy, a series of successive phenomena, many of them random, take place. A woman of childbearing age has a menstrual cycle that extends from the first day of a menstrual period to the day immediately preceding the next menstrual period. This cycle is the result of synchronous mechanisms between the hypothalamus, pituitary, ovary and endometrium⁽³⁰⁾.

After copulation, if the conditions are right, the union between egg and sperm occurs in the ampulla of the female tube in a phenomenon called fecundation or fertilization, which gives rise to the fertilized egg or zygote. The preimplantation development of human embryos occurs from the formation of the pronuclei in the tube to the implantation of the blastocyst in the endometrium of the maternal uterus. This transit lasts between 5 and 6 days and culminates with the formation of the blastocyst. During this transit cell divisions occur. The first cell division occurs 25 to 27 hours after fertilization and the following divisions occur approximately every 12 hours until the blastocyst reaches the endometrium⁽³¹⁾, where, if the appropriate conditions are met, implantation occurs, at which time pregnancy begins⁽³²⁻³⁴⁾.

We have previously stated that the transit through the tube of the fertilized egg and the blastocyst lasts several days and is hazardous, a true odyssey that exposes the product of conception to risks, since not all the mature eggs that are captured by the tube are fertilized by the spermatozoon, not all fertilized eggs reach the endometrium, not all blastocysts that reach

the uterus implant in the endometrium and not all implanted blastocysts continue in a normal pregnancy and reach term, since the conditions of the natural environment can be adverse to gestation.

Once implantation has occurred, we cannot yet speak of a person in the terms we conceptualize it today, since the review of neuroanatomical and physiological evidence in the fetus tells us that the connections from the periphery to the cortex are not completed before 24 weeks of gestation⁽³⁵⁾. Known research led the English Parliament to establish that fetal viability occurs at 24 weeks of gestation^(36,37).

On the other hand, the UN Human Rights Committee has expressed that the 'embryo' cannot be considered as part of the category 'childhood' protected by human rights conventions⁽³⁸⁾.

ETHICAL ASPECTS

Aristotle, son of Nicomachus, who was physician to the Macedonian king and had Alexander the Great as a disciple, established four capital virtues: prudence, justice, fortitude, and temperance. For Aristotle, the action that is the object of ethics is a process oriented to an end, which in turn is determined by the nature of the agent subject and which also receives the generic name of 'good'. Aristotle considers it necessary to circumscribe the notion of good to the concrete sphere of each individual, otherwise of each species of individuals. The concern of ethics since antiquity is that of the freedom of the will, or in its classical denomination that goes back to St. Augustine is the 'free will'. The realm of human action is the realm of freedom. It is precisely the process of deliberation and the resulting choice that constitutes the exercise of the faculty he designates as practical understanding, which differentiates it from theoretical understanding, considered as the divine. It is the specifically human faculty, on the correct exercise of which the worth of the human being depends. It is what would constitute prudence (or phronesis). Thinking and reasoning is the only or the best function of the soul⁽³⁹⁾.

According to Kant, reflection is at the service of moral life, not religious sentiment⁽⁴⁰⁾. And the conclusions of a Seminar of the Peruvian Medical



Association tell us that, in all assisted reproduction procedures, medical professionals should respect the bioethical principles of autonomy, requesting informed consent; beneficence, doing the greatest possible good; non-maleficence, taking care not to further affect the woman and her partner; and justice, giving all users the possibility of qualified care⁽⁴¹⁾. This means scrupulous respect for the principles of bioethics⁽⁴²⁾.

Our understanding of life as life itself brings with it a strong demand for a response to the ethical problems it raises; at the same time, it recognizes that such problems must be examined in the light not only of the respect due to the dignity of the human person, but also of the universal respect for and observance of human rights and fundamental freedoms⁽⁴³⁾.

While it is true that scientific knowledge and skills are transcendent in the training of the physician, the ethical component also plays a central role. Since the time immemorial of medicine, it is said that Hippocrates coined the idea of first do no harm (*primum non nocere*)⁽⁴⁴⁾. This means that the moral dimension is a characteristic feature of human beings. Life in community, indeed life itself, would not be possible if its members did not submit to certain rules or norms that regulate their interactions. Such rules derive from the uses, habits, and customs of a community at a given time. These rules are changeable and evolve in step with the variations⁽⁴⁵⁾.

In the Code of Ethics of the Peruvian Medical Association we find the two articles that I will now mention: Art 1.- It is the duty of the physician to perform his profession competently, having, for this purpose, to improve his knowledge, skills, and attitudes continuously and to exercise his profession integrating himself into the community, with full respect for the socio-cultural diversity of the country. Art 9.- The physician must practice medicine on a scientific basis and be guided by validated medical procedures⁽⁴⁶⁾.

IN RELATION TO EMERGENCY ORAL CONTRACEPTION – EOC

Those who still believe that EOC is abortive because it prevents the implantation of the blastocyst in the endometrium (as was stated in a recent symposium), should keep calm, because

the knowledge, product of the most rigorous research, sustains that its mechanism of action is prior to implantation and even prior to fertilization, since it acts delaying or preventing ovulation⁽⁴⁷⁻⁵⁰⁾, accepted even by Catholic authors in publications of Catholic affiliation^(51,52).

In conclusion, scientifically speaking, with the prudence recommended by Aristotle and current ethical considerations, pregnancy in the human being begins with the implantation of the blastocyst in the endometrium and there is no basis for accepting the right of the conceived from the moment of fertilization as if it were a person.

RIGHTS OF THE CONCEIVED: COMMENTARY II

Patrick Wagner Grau

- Human life has an uninterrupted continuity from its conception, that is, from its beginning, until its natural end, death (from the Latin *mors* = brake). With jolts yes, but without interruption or interruptions. Thus, the zygote, the fertilized ovum, is a life that is beginning. It already has its own genetic endowment, a unique DNA, different from that of its progenitors. There is no doubt that we are at the beginning of a new life, a human life. This being will become uniquely and solely a human being, a person.
- Philosophical foundations: Aristotle's Ontology, in the third century B.C., clearly established⁽⁵³⁾, the classic theory of potency and act. Potency is the possibility of being. Act is the reality of being. Potency becomes act by an irreversible movement, actualization or activity. A potency will originate only a possible act. The human pre-implantation embryo, potency, can only give rise to a personal human being, act. It will never be able to become a dog, a tree or a reptile. Here the great question arises: who comes first, the potency or the act? From the physical point of view, potency would come first, for without it there is no act. But from the metaphysical point of view, the act comes first, for without its existence there could be no potency towards it. Without singing, for example, the potency of singing could not exist⁽⁵⁴⁾. Therefore, the act determines the potency. Applied to the case of the preimplantation embryo, the act,



which is the person, determines the zygote or embryo, belonging to the human mankind. It can only be in the future, a person.

SOME PROVEN FACTS:

- It is, then, a human individual, in the literal sense, individual or undivided, which cannot be divided, for if it were, it would lose its proper being⁽⁵⁵⁾. It is already, on its scale, a complete being.
- It is an individual of the human species, which is gestated or develops within the body of another individual, a person, the mother. It is not, therefore, a part of the maternal body but a life in germ, which has its own vital dynamics. Keeping the distance and the proportions, a parasite or a bacterium, living beings, are not part of the body of the host, but are another life, which develops or unfolds according to its own vital dynamism^(56,57).
- The embryonic (or fetal) individual already possesses a primitive instinct of conservation, true, but existing. We see how the unborn child 'defends itself' when it is attacked: it recoils, curls up, and escapes the violent action of the aggressor object (catheter, stiletto, sharp object) that attacks it⁽⁵⁸⁾. Voluntary termination of pregnancy (VTP) is, without a doubt, an aggression against the life of a new being, incapable of adequately defending itself.
- Let us leave aside the term person, which is controversial and lends itself to endless discussion, confusion, and misunderstanding. We do not know, nor do scientists and philosophers know, at what point in the development of the human individual, this becomes a person.

What the conceived person is, however, is a human life, which at some point (?) will inevitably become a person.

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